

January 17, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Business Data Services, WC Docket No. 16-143
Special Access for Price Cap Local Exchange Carriers, WC Docket 05-25
AT&T Petition for Rulemaking, RM-10593.**

Dear Ms. Dortch:

Pursuant to the Public Notice released on January 9, 2017,¹ NCTA – The Internet & Television Association (“NCTA”) hereby respectfully objects to the request of four members of the staff of the California Public Utilities Commission (“CPUC”) to gain access to Confidential and Highly Confidential information submitted in the above-referenced proceedings. The request for access cannot be granted because the CPUC has not been a Participant in the Business Data Services (BDS) proceeding, which is a prerequisite for access to Confidential or Highly Confidential Information under the Protective Orders issued by the Commission. Moreover, even if the CPUC could be deemed to be a Participant based on some future intent to participate, the Commission should hold the CPUC request, and any similar request from any other prospective party, in abeyance until it is clear that further comments will be entertained in the proceeding.

The CPUC staff members seek access under the procedures outlined in the *Data Collection Protective Order*, the *Modified Protective Order* and the *Second Protective Order*.²

¹ *Additional Party Seeking Access to Data and Information Filed in Response to the Business Data Services (Special Access) Data Collection*, Public Notice, WC Docket No. 05-25, RM-10593, DA 17-32 (rel. Jan. 9, 2017). The notice references acknowledgments filed by Karen Eckersley, Supervisor, Communications Division, California CPUC; Thomas Glegola, Supervisor, California CPUC; Kimberly Lippi, Public Utilities Counsel; and Lisa Prigozen, Public Utilities Regulatory Analyst.

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, 29 FCC Rcd 11657 (Wireline Comp. Bur. 2014) (“*Data Collection Protective Order*”); *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Modified Protective Order, 25 FCC Rcd 15168 (Wireline Comp. Bur. 2010) (“*Modified Protective Order*”); *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, 25

The Protective Orders limit access to counsel or consultants employed or retained by Participants to the FCC's BDS proceeding.³ A Participant is "a person or entity that has filed, or has a good faith intention to file, material comments in this proceeding."⁴ To date, the CPUC has not been a Participant in the FCC BDS proceeding. The BDS proceeding was highly active all throughout 2016, with the Commission soliciting two rounds of comments (one before the FNPRM and one after the FNPRM) and allowing an extensive period for ex parte submissions and meetings. Yet at no time until now—well after the close of the public comment period, and after the Commission declined to consider a draft order at the November 2016 open meeting—did the CPUC attempt to participate.⁵

Although the definition of Participant includes an entity with "good faith intention" to file "material" comments, the CPUC staff have not expressed such intention and, in any event, it is not clear that an opportunity for further material comments will arise given the current status of this proceeding. Chairman Wheeler circulated an item for a vote at the Commission's November 2016 agenda meeting, but subsequently pulled the item from the agenda. Although the proceeding remains open, it is unclear whether, and if so how, the new administration will move forward. At a minimum, the Commission should hold in abeyance the requests of CPUC staff or any other proposed new parties until it is clear that the rulemaking will proceed and there will be further opportunity for comment. At such time, the Commission can fully consider whether access by CPUC staff is warranted and under what conditions.⁶

FCC Rcd 17725 (Wireline Comp. Bur. 2010) ("*Second Protective Order*"). Requests for access under the *Data Collection Order* and related acknowledgments were filed on December 14, 2016. Requests for access under the *Modified Protective Order* and the *Second Protective Order* and related acknowledgments were filed on January 5, 2017.

³ See *Data Collection Protective Order* at ¶ 1 (defining In-House Counsel as an attorney "employed by a Participant in this proceeding;" defining Outside Counsel as "retained by a Participant;" and defining Outside Consultant as an "expert or consultant retained for purpose of assisting Outside Counsel or a Participant.").

⁴ *Data Collection Protective Order* at App. A ¶ 1.

⁵ The comments that the CPUC have filed that reference the BDS dockets, Docket 05-25 and RM-10953, addressed only the responses to the FCC's separate technology transitions proceeding and backup power rules. See Comments of the California Public Utilities Commission, Dockets PS 14-174, GN 13-5, WC 05-25, RM-10593, filed February 26, 2015, at 2 ("The CPUC here comments on the questions the FCC has posed related to backup power for Customer Premises Equipment (CPE), copper retirement, and customer notice about changes."); Comments of the California Public Utilities Commission, Dockets 13-5, RM 11358, WC 05-25, RM-01593, filed October 30, 2015) ("The California Public Utilities Commission (CPUC or California) submits these comments in Response to the *Further Notice of Proposed Rulemaking (NPRM)* released by the [FCC] on August 7, 2015" – on the technology transition.).

⁶ While the CPUC has its own proceeding in which it is monitoring BDS services, any use of confidential data collected by the FCC in that state proceeding would clearly be prohibited under the terms of the Protective Orders, which authorize the use of confidential and highly confidential information "solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding" and specifically ban use of confidential or highly confidential data or information for other governmental purposes or in "any other administrative, regulatory or judicial proceedings." *Data Collection Protective Order* at ¶ 8. See also, *Modified Protective Order* at ¶ 9; *Second Protective Order* at ¶ 7.

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Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris
Jennifer K. McKee

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing
Opposition of NCTA – The Internet & Television Association to be served by postage pre-paid,
first class mail, this 17th day of January, 2017.

Kimberly Lippi
Public Utilities Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

/s/ Gretchen M. Lohmann